R.D. # 0011-02
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

KELLY'S JANITORIAL SERVICE, INC.
& ABEL LEASING COMPANY, INC.[1]
Joint-Employers

And **CASE 22-RC-12238**

LOCAL 210, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
AFL-CIO[2]
Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent an appropriate unit of the Joint-Employer's employees. As there were no issues raised which would preclude an election in this matter, I will direct an election in the appropriate unit. I further find, for the reasons described below, that the Hearing Officer properly precluded the Joint-Employers from litigating the jurisdiction and consent issues raised in their offers of proof.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this

[1] The names of the Joint-Employers appear as amended at the hearing.
[2] The name of the Petitioner appears as amended at the hearing.

proceeding,[3] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Joint-Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

3. The labor organization involved claims to represent certain employees of the Joint-Employers.[5]

4. A question affecting commerce exists concerning the representation of certain employees of the Joint-Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Joint-Employers constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[6]

> **All full-time and regular part-time janitorial service workers jointly employed by the Joint-Employers at their Newark International Airport, Newark, New Jersey facilities, excluding all office clerical employees,**

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[3] Briefs filed by each of the Joint-Employers were fully considered. No other briefs were filed.

[4] Kelly's Janitorial Service, Inc. (herein Kelly), a New Jersey corporation, is engaged in providing janitorial services at various Newark International Airport, Newark, New Jersey facilities, the only location involved herein. Abel Leasing Company, Inc. (herein Abel), a New Jersey corporation, is engaged in supplying employees to provide janitorial services at various Newark International Airport, Newark, New Jersey facilities, the only location involved herein. Kelly and Abel, herein collectively called the Joint-Employers, stipulated that they collectively determine various terms and conditions of employment for the employees included in the collective bargaining unit and are Joint-Employers within the meaning of the Act.

[5] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[6] The unit description is in accord with the stipulation of the parties which I find to be appropriate for purposes of collective bargaining. There are approximately 120 employees in the unit.

professional employees, guards and supervisors as defined in the Act, and all other employees.

1. Jurisdiction

The Joint-Employers assert that the Board should decline to assert jurisdiction in this matter because their relationship with the Port Authority of New York and New Jersey (herein Port Authority), an exempt entity, is such that the contract between Kelly and the Port Authority dictates the essential terms and conditions of employment, thereby preventing the Joint-Employers from engaging in meaningful collective bargaining in accordance with the Board's decision in *Res Care, Inc.,* 280 NLRB 670 (1986), which it acknowledges has been overruled by the Board's decision in *Management Training Corporation*, 317 NLRB 1355 (1995). In essence, the Joint-Employers assert that the Board should overrule *Management Training Corporation* and return to its holding in *Res Care.* As I am bound by Board precedent, I am without authority to grant the Joint-Employers' request.

In *Management Training Corporation,* above*,* the Board held that the *Res-Care* test for deciding whether it would assert jurisdiction over an Employer with close ties to an exempt government entity was "unworkable and unrealistic."[7] The Board abandoned the rationale of *Res-Care,* which substituted the Board's assessment of the quantity and/or quality of the terms and conditions of employment available for negotiation, for that of the parties themselves. Instead, the Board held that in determining whether the Board should assert jurisdiction, it will only consider whether the Employer meets the definition of "employer" under Section 2(2) of the Act and

[7] 317 NLRB at 1358.

whether such employer meets the applicable monetary jurisdictional standards. Section 2(2) of the Act excludes from the term "employer" both federal and state governmental entities as well as "political subdivisions thereof." There is no evidence nor contention that the Joint-Employers are exempt from the Board's jurisdiction on this basis. Cf. *Concordia Electric Cooperative,* 315 NLRB 752 (1994); *Northampton Center for Children and Families,* 257 NLRB 870 (1981).[8] As to the monetary jurisdictional standards, the Joint-Employers concede that their operations satisfy the Board's discretionary and statutory requirements and, therefore, affect commerce within the meaning of Section 2(6) and (7) of the Act. Contrary to the Joint-Employers, I find that jurisdiction should be asserted over them and that the Joint-Employers satisfy the *Management Training Corporation* test. *Management Training Corporation,* above*; R & W Landscape & Property Management, Inc.,* 324 NLRB 278 (1997); *Aramark Corporation,* 223 NLRB 256 (1997).

2. Consent

The record reveals that Kelly and Abel stipulated that they "collectively determine various terms and conditions of employment for the employees included in the unit and accordingly stipulate that they are Joint-Employers within the meaning of the Act." Notwithstanding this stipulation, Kelly and Abel contend that they do not consent to a multiemployer joint bargaining relationship.[9] I find, for the reasons described below, that as Joint-Employers their consent is not required to establish a

[8] The Hearing Officer did not take testimony on the jurisdictional issue but rather allowed the Joint-Employers to make an offer of proof thereon. I find that this ruling was appropriate in this circumstance.

[9] They urge the Board to return to its holding in *Lee Hospital*, 300 NLRB 947 (1990), which the Board in *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1304 (2000) found was "incorrectly decided."

unit composed of employees who are jointly employed. *M.B. Sturgis, Inc.,* 331 NLRB 1298 (2000). In *Sturgis*, the Board held that a unit composed of employees who are jointly employed by a user employer and a supplier employer and employees who are solely employed by the user employer is permissible under the statute without the consent of the employers. Id at 1304. I note that the instant matter does not involve multiple user employers whose only relationship to each other is that they obtain employees from a common supplier employer. In such cases, if the union seeks to represent a unit that includes employees of all of the users, the union is attempting to establish a multiemployer unit. Such would require consent of each separate user employer before the Board would direct an election. *Greenhoot, Inc*, 205 NLRB 250 (1973); *M.B. Sturgis*, supra at 1305. This is not the situation here, as there is only one user employer (Kelly) and one supplier employer (Abel). Accordingly, I find that the unit sought by the Petitioner of those employees jointly employed by the Joint-Employers is appropriate and does not require their consent.[10]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible

[10] The Petitioner is not seeking to represent two employees who may solely be employed by Kelly. They are Sam Hardwick and Maryam Hardy. The record is silent as to their duties or whether they share a community of interest with the petitioned for jointly employed employees. The Joint-Employers have not taken a position as to their status. As the parties have stipulated that only jointly employed employees should be included in the unit and as the record is not explicit as to whether or not these two employees are jointly employed, I will permit them to vote subject to challenge.

to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 201, International Brotherhood of Teamsters, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Joint-Employers with the undersigned, who shall make the list available to

all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, Veterans Administration Building, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before August 27, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 3, 2002.

Signed at Newark, New Jersey this 20th day of August 2002.

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Gary T. Kendellen, Regional Director
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